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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 598

THE STATE OF NEW YORK,
Petitioner,

against

JOSEPH CARDINAL, doing business under the name and style of CARDINAL ENGINEERING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE HIGHEST COURT OF NEW YORK STATE

NATHANIEL L. GOLDSTEIN
Attorney General of the State
of New York
Attorney for Petitioner

WENDELL P. BROWN
Solicitor General

HENRY S. MANLEY
Assistant Attorney General

Of Counsel

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of New York, by its undersigned Attorney General, prays for a writ of certiorari to review a decision of the Court of Appeals of the State of New York, being the court of last resort of that State. The decision is officially reported as *Cardinal* v. *State*, 304 N. Y. 400. The decision is final in nature, as appears by the remittitur of the Court of Appeals and its subsequent orders and the proceedings of the Court of Claims of the State of New York obedient to them. The ultimate effect of the decision and remittitur and orders of the Court of Appeals was to cause the Court of Claims to enter judgment on December

22, 1952, in favor of Cardinal and against the State for liability of $87,000, in addition to affirming a liability of $14,000 previously adjudged against the State by an Appellate Division, plus certain costs and interest.

The State respectfully represents that the Court of Appeals decided substantial Federal questions in a way probably not in accord with the applicable decisions of this Court, and denied to the State a right or immunity specially set up and claimed under a statute of the United States.

Statement of Matter Involved

The State's liability was asserted and determined because it had issued, through its State Insurance Fund, a policy of insurance and an endorsement thereof covering certain liabilities relative to the Workmen's Compensation Law and the Longshoremen's and Harbor Workers' Compensation Act.* Paragraph One (a) of the policy and endorsement covered the liabilities of Cardinal to his employees and their representatives for their injuries, as imposed by the Law and Act respectively. Paragraph One (b) covered other liabilities imposed by law upon the employer because of such injuries to his employees. That is, it covered what are commonly called "third party liabilities". It expressly excluded liabilities which the employer assumed by contract with third parties.

On January 3, 1945, while those policy and endorsement provisions were in force, there was an accident on the steamship "Hilton". It was a maritime accident on navigable waters while the ship was moored at a New York

* The relevant provisions of the statutes are Appendix A to this petition and the relevant provisions of the policy and endorsement are Appendix B.

pier for repairs. Cardinal was making the repairs under contract with the United States which owned the "Hilton". A number of Cardinal's employees were injured and one was killed.*

The injured employees and the representative of the deceased employee were paid the appropriate compensation and medical benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Act provides that such liability is "exclusive" (33 U. S. C. § 905). But it had been held that a similar provision of the N. Y. Workmen's Compensation Law (§ 11) did not protect an employer from indemnifying a third party who had been held liable to his employees, provided the employer's negligence was "active" and the third party's negligence was merely "passive". *Westchester Lighting Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175 (1938). Libels were brought on behalf of the injured employees against the United States. It cross-petitioned against Cardinal, alleging two causes of action, the first based on his alleged negligence and the second based on his contract with the United States. Cardinal's answer to the libels and cross-petition alleged that his employees had received their payments under the Act and pleaded that as a bar to any further liability by him.*

The State refused to defend Cardinal. The United States settled with the injured employees for $145,000 and Cardinal paid sixty percent of that amount or $87,000. He also

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* The facts of the accident and injuries appear from the majority opinion of the Court of Appeals (304 N. Y. at p. 406) also the opinions of the lower courts (R. 3, 9-10 and 139) and the testimony (R. 58-66).

* The pleadings in the admiralty proceedings are Cl. Ex. 31 herein (R. 93). See also the majority opinion of the Court of Appeals (304 N. Y. at pp. 406-407) and the opinions of the lower courts (R. 12, 136-137, 140).

expended $14,000 for legal services relative to his defense and settlement.

Under the practice of the Court of Claims the State does not plead its defenses, it briefs them after trial of the facts. In the present suit the State has at various times relied on other defenses, but constantly it has relied on the immunity under 33 U. S. C. § 905, to the effect that Cardinal's liability under the Act was "exclusive" of any liability to third parties for Cardinal's negligence to his employees. The State's position has been constantly that the liability to the United States which Cardinal settled must have arisen under their contract, because there was no other liability. Such liability does not arise between joint tortfeasors in admiralty in a non-collision case whether the negligences are active or passive, and moreover such liability is forbidden by 33 U. S. C. § 905 when applied to the facts of the present case.

The Court of Claims held that in admiralty there was a right of contribution between joint tortfeasors, but not under the circumstances of the present case (R. 24-25). For that distinction it relied upon *American Mutual Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322 (2d Cir. 1950).

The State had cited that and various other Circuit Court of Appeals citations to show that for present purposes the *Westchester* decision was not to be followed. Its argument is illustrated by the following paragraph from pages 5-6 of the State's brief before the Appellate Division:

> "The reason the obligation does not arise under admiralty law upon the facts of the present case is shown in *American Mutual Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322 (2d Cir., 1950), and related cases." [Footnote citations omitted for present purposes.] "The Federal courts, for admiralty law and under provisions of the Longshoremen's and Harbor

> Workers' Compensation Act, have reached a result diametrically opposed to the result our Court of Appeals reached under our Workmen's Compensation Law in the case of *Westchester Lighting Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175 (1938). The language, that the statutory remedy of employees shall be 'exclusive and in place of any other liability whatsoever', found in both statutes, has been held by the Federal courts to mean that employees cannot place an additional liability on employers by indirection. That is, employees can recover against a third party, but he cannot demand that their employer do more than pay the compensation and medical benefits according to the statutory schedule."

The Appellate Division agreed with the Court of Claims upon the matter previously summarized (R. 142). Both courts held that under Federal law there was no liability of Cardinal to the United States which supported the $87,000 settlement other than a contractual liability and hence Cardinal was not entitled to recover that sum from the State.

A majority of the Court of Appeals has held, notwithstanding 33 U. S. C. § 905 and *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282 (Jan. 1952), that Cardinal is entitled to recover its $87,000 settlement from the State. See its discussion of the *Halcyon* case at 304 N. Y. pages 413 and 416-418, particularly its conclusion at the top of page 418 that:

> "Seemingly, the maritime courts, despite the *Halcyon* and *Matthews* cases *(supra)*, still follow our *Westchester Lighting Co.* case * * *."

The reasons upon which the State supports its representation that the Court of Appeals decided substantial Federal questions inconsistently with the applicable decisions of this Court, and denied to the State a right or immunity

specially set up and claimed under a statute of the United States, will be presented in subsequent pages of this petition.

Basis of Jurisdiction.

Authority for the proposed review is of course to be found in 28 U. S. C. § 1257 subd. 3, to the effect that a final judgment or decree of the highest court of the State may be reviewed by writ of certiorari,

> "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The statute of the United States under which the State claims a right or immunity is § 905 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 905) which is quoted in an appendix to this petition. It provides that the liability of an employer, and hence of his insurer, shall be,

> "exclusive and in place of all other liability of such employer to the employee, his legal representative * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

The timing of this application presents a jurisdictional problem. The Court of Appeals announced its decision on July 15, 1952, and the present application will not be filed until February 1953. The time within which such an application can be made is of course limited by 28 U. S. C. § 2101 subd. (c), and must be "within ninety days after the entry of such judgment or decree", except that, "a justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days". On January 19, 1953, Mr. Justice Jackson signed an order as follows:

> "It is Ordered that the time for filing petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including March 9th, 1953, provided the time has not already expired."

The certification of the record herein, excepting the opinions of the Court of Appeals which are certified by its Chief Judge and Clerk and the Official Reporter, is by the Clerk of the Court of Claims. As appears from his certification the original record came to him from the Court of Appeals accompanied by its remittitur, by which the case was remitted to the Court of Claims,

> "for entry of judgment in favor of the claimant as demanded in the claim, with costs in all courts."

The judgment in favor of Cardinal and against the State was not entered until December 22, 1952, according to the same certification. The reasons for the delay are suggested by recitals in the judgment, and also by orders of the Court of Appeals on October 9, 1952, and December 5, 1952, which are certified by its Clerk and presented as parts of the record. See also the official reports of those orders, at 304 N. Y. 732 mem. and 875 mem. respectively.

It thus appears that at some time after the decision of July 15, 1952, the State duly made application for reargument in the Court of Appeals, which application was entertained by that Court and denied on October 9, 1952. The extension of time to March 9, 1953, under the order of Mr. Justice Jackson, confers a total of 150 days after October 9, 1952.

After the denial of reargument and before entry of judgment in the Court of Claims an application to the Court of Appeals was made by Cardinal for amendment of the remittitur. This application was entertained by the Court and was denied on December 5, 1952. The problem pre-

sented was whether the judgment to be entered in the Court of Claims in favor of Cardinal and against the State should include about five years interest on the recovery of $101,000. The decision of the Court of Appeals was that "the question of interest in this cause is, in the first instance, for the Court of Claims to pass upon". As appears from a recital in the judgment entered December 22, 1952, an order for such interest preceded entry of the judgment.

The judgment of December 22, 1952, was the first entry in any court of the indebtedness asserted in favor of Cardinal and against the State for the sum of $87,000 and interest having sufficient formality and precision and force to authorize its payment by the State. It was the first and only judgment for the principal sum in litigation which would support process for its collection against a defendant other than the State. It was the first and only judgment for that sum from which an appeal might have been taken consistently with the practice of the State courts.

Early in January 1953 the State, intent on the present application, became aware of the possible significance for present purposes of *Dept. of Banking* v. *Pink*, 317 U. S. 264, and *Cole* v. *Violette*, 319 U. S. 581. Those decisions make it clear that if there had been before July 15, 1952, a formal judgment in favor of Cardinal and against the State for the sum of $87,000 and interest, which is principally at issue herein, and if that judgment was merely affirmed by the Court of Appeals, application for certiorari immediately after the decision of affirmance would not have been premature. The limited period would in such case run from the decision, subject however to extension pending the application for reargument and perhaps pending Cardinal's motion to amend the remittitur.

It is respectfully submitted that the present case is materially different from the cases to which the two citations

applied, and that the practice announced in those decisions should not be extended to the present facts. Moreover, if the practice does extend to the present facts, the State submits that the power of the Court to extend the time for this application should be exercised to its fullest extent and is not exceeded by the order of January 19, 1953.

Questions Presented

1. Was the decision of the Court of Appeals, holding that Cardinal was liable to the United States otherwise than by their contract, for injuries sustained by Cardinal's employees in a maritime accident which was not a collision, consistent with the decision of this Court in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, and any other applicable decision?

2. Did such decision of the Court of Appeals deprive the State of a right or immunity which it claimed under the Constitution or any statute of the United States, and particularly under 33 U. S. C. § 905?

Reasons for Writ

The dissenting opinions in the Court of Appeals, which are reported in 304 N. Y. pages 419-424, support the State's suggestion that the majority of the Court erred upon important Federal questions. The State adopts as its entire brief and argument for present purposes the following paragraphs from the dissenting opinion of Judge Dye, together with the summary of the same ground in the shorter dissenting opinion of Judge Fuld:

> "The dispute turns on whether, under the circumstances of this case, Cardinal as impleaded defendant was under an obligation 'imposed by law' to contribute to his joint tort-feasor; for if he was, then the coverage of the policy was available to him and the Fund

should have reimbursed him for his contribution to the settlement and accepted defenses of the interpleading petition. Everyone agrees that unless there is a liability 'imposed by law', he may not recover for the indemnity obligation assumed by contract is specifically excluded. When the accident giving rise to the claims occurred on January 3, 1945, it is claimed that the admiralty law was not clear as to whether contribution between joint tort-feasors in noncollision cases was governed by the moiety rule *(The North Star,* 106 U. S. 17; *The Chattahoochee,* 173 U. S. 540; *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394) or the common-law rule *(Chapman* v. *Forbes,* 123 N. Y. 532). The Federal courts have held, however, that when the third party is an employer covered by the Longshoremen's and Harbor Workers' Compensation Act (U. S. Code, tit. 33, § 933) the liability of the employer is not the kind of wrongdoing that will be regarded as creating a common responsibility, for the act has provided an absolute duty to pay the prescribed compensation *(The Ira M. Hedges,* 218 U. S. 264). The Longshoremen's Act is also a valid defense to an asserted right of contribution *(American Mut. Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322 [C. A. 2d]; see also *Rich* v. *United States,* 177 F. 2d 688 [C. A. 2d]).

"The Fund took the position throughout, and was sustained in the courts below, that Cardinal had no liability imposed by law within the coverage of the policy. While the case was being litigated, albeit subsequent to the date of the accident giving rise to it, the United States Supreme Court settled any doubt as to contribution between joint tort-feasors in noncollision cases by holding that the common-law rule of noncontribution between joint tort-feasors is applicable *(Halcyon Lines* v. *Haenn Ship Corp.,* 342 U. S. 282). We are bound by the rule of that decision. Our practice is well settled that we take the law as we find it at the time of the appeal, whether statutory *(Matter of Kahn* [*National City Bank*], 284 N. Y. 515; *Robinson* v. *Robins Dry Dock & Repair Co.,* 238 N. Y. 271; *Matter of Tartaglia* v. *McLaughlin,* 297 N. Y. 419; *Gilpin* v. *Mutual Life Ins. Co. of N. Y.,* 299 N. Y. 253), or decisional *(Graybar Elec. Co.* v. *New Amsterdam*

Cas. Co., 292 N. Y. 246). The case of *McFall* v. *Compagnie Maritime Belge* (304 N. Y. 314), handed down herewith, suggests no different result for there we dealt with the rights of a passively negligent owner and active wrongdoers, while our present case arose out of a joint wrong by active tort-feasors, a difference which points the distinction."

The petitioner prays and respectfully submits that this Court grant certiorari herein.

February 5, 1953.

NATHANIEL L. GOLDSTEIN
Attorney General of the State
of New York
Attorney for the Petitioner

WENDELL P. BROWN
Solicitor General

HENRY S. MANLEY
Assistant Attorney General
Of Counsel

Appendix A

N. Y. Workmen's Compensaton Law § 10:

"Every employer subject to this chapter shall * * * secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury * * *" (Originally enacted by L. 1914 c. 41, substantially as above, which follows the wording as amended.)

N. Y. Workmen's Compensation Law § 11:

"The liability of an employee prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death * * *" (Originally enacted by L. 1914 c. 41, substantially as above, which follows the wording as amended.)

Historical relationship between N. Y. Workmen's Compensation Law and Longshoremen's and Harbor Workers' Act.

On August 15, 1914, an employee named Jensen was killed while unloading a steamship at a New York pier. An award was made under the State law and upheld by the Court of Appeals, but it was reversed by the Supreme Court of the United States. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), four justices dissenting. It was held that the State law as applied was unconstitutional because of the "exclusive jurisdiction" of the Federal courts in maritime matters and the inconsistency between the State law and certain Federal acts. See also, *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920).

An Act of Congress in 1922 which attempted to give the States power to impose liability in such cases under their compensation laws was held invalid. *Washington* v. *Dawson,* 264 U. S. 219 (1924).

Thereupon, in 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424), and the New York Legislature authorized the State Insurance Fund to insure obligations under the Act (L. 1928 c. 750).

Longshoremen's and H. W. C. Act § 904:

"Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this chapter. * * * Compensation shall be payable irrespective of fault as a cause for the injury."

Longshoremen's and H. W. C. Act § 905:

"The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *"

Appendix B

Excerpt from Claimant's Exhibit 1, the Policy issued by State Insurance Fund to Cardinal:

"One (a): Against all liability under Chapter 41 of the Laws of 1914, State of New York, known and cited as the Workmen's Compensation Law, as amended and revised by Chapter 615 of the Laws of 1922, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force, in respect of operations described in the declaration attached to this policy together with operations incident thereto while conducted either at the work places herein described and defined or elsewhere in connection therewith, and

"One (b): Agrees to indemnify this employer against loss by reason of any liability imposed upon him by law for damages on account of such injuries to such employees wherever such injuries may be sustained. These obligations are limited to the liability imposed by law upon the employer for negligence but specifically exclude any liability on account of occupational disease as well as any liability assumed by the employer under any contract entered into with any other person, association or organization."

Excerpt from State's Exhibit B, an Endorsement of September 7, 1944, to the Policy:

"The obligations of the Policy to which this endorsement is attached, include the Longshoremen's and Harbor Workers' Act, being Public Act No. 803 of the 69th Congress, approved March 4, 1927, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

"The State Insurance Fund's liability under Paragraph One (b) of the Policy to which this endorsement is attached shall be limited to $25,000, as respects injuries or death sustained by one or more persons as a result of any one accident. This endorsement is applicable with respect to any accident sustained on navigable waters by persons whose work comes within the scope of any classification for which the Policy provides coverage under the United States Longshoremen's and Harbor Workers' Compensation Act."

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

DANIEL MCNAMARA,
Attorney for Respondent.

THOMAS A. MCDONALD,
Of Counsel.

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